

TESTING THE LIMITS OF ANTIDISCRIMINATION LAW.  
**THE BUSINESS, LEGAL, AND ETHICAL RAMIFICATIONS OF CULTURAL  
 PROFILING AT WORK**

LAURA MORGAN ROBERTS\* AND DARRYL D. ROBERTS\*\*

*I am not my hair  
 I am not this skin  
 I am not your expectations  
 I am not my hair  
 I am not this skin  
 I am the soul that lies within  
 –India Arie*

## I. INTRODUCTION

The lyrics from this popular Neo-Soul artist illustrate the profound pressure that many women and ethnic minorities experience in the workplace when they choose to perform certain aspects of their identity that do not fit within the mainstream culture. Particularly worrisome to this artist and other employees is the pressure that these groups experience when their cultural displays are interpreted as a proxy for their personal values, professional competence, and organizational fit. While the pain and anxiety that employees experience is real, neither the law nor most members of society condemn those organizations that punish employees who wear certain hairstyles, speak in a non-English native tongue in the workplace, display ethnic artwork in their office, or refuse to go out drinking with colleagues for religious reasons. A question of critical importance to courts, corporations, and members of society is whether grooming codes and other constraints on cultural displays are necessary to maintain a productive and cohesive workplace. It is equally important to consider the extent to which such constraints might create a discriminatory atmosphere that violates minority employees' rights.

This essay aims to address both of these questions regarding the costs and benefits of constraining cultural displays in the workplace on legal, business, and moral terms. In this article, we invite legal and organizational scholars to question the legitimacy of *cultural profiling*, the practice of actively monitoring workers' behavior to assess how well they embody the values of their employing organization and of penalizing those employees who engage in

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\* Assistant Professor of Organizational Behavior, Harvard Business School; Ph.D., Organizational Psychology, University of Michigan; B.A., University of Virginia.

\*\* Ethics and Society doctoral student, Graduate Division of Religion, Emory University; J.D., Boston College Law School; M.Div., University of Chicago; B.A., Grinnell College.

deviant cultural behaviors. First, we introduce the term “cultural profiling,” distinguish it from other forms of profiling, and illustrate its occurrence in the workplace. Next, we discuss the underlying assumptions about identity performance and organizational culture that are used to justify formal and informal cultural profiling practices. We then review key arguments that support or challenge cultural profiling at work.

While courts have rarely ruled in favor of plaintiffs bringing discrimination claims based on identity performance, legal scholars have argued that discrimination on the basis of certain cultural displays should be prohibited because it creates a work environment that is “heavily charged” with ethnic and racial discrimination. We add to legal scholarship on identity performance by incorporating empirical research from organizational behavior that addresses the deleterious consequences of workplace cultural profiling on the emotional and professional well-being of minority employees. Drawing upon empirical studies of diversity management, stereotyping, and group dynamics, we describe how workplace cultural profiling often creates an unproductive atmosphere of heightened scrutiny and identity performance constraints that lead workers (especially those from marginalized groups) to behave in less authentic, less innovative ways in diverse organizational settings. We also extend beyond legal scholarship by applying ethical principles to evaluate the benefits and harms of cultural profiling in the workplace, and how corporations can develop policies that more effectively promote the common good. In conclusion, we discuss the implications of this cultural profiling framing for scholarship and practice.

A considerable amount of legal scholarship on identity performance emphasizes the ways in which grooming codes and aesthetic choices influence the treatment of members of marginalized groups in the workplace.<sup>1</sup> Aesthetic choices are an important component of identity performance, as they signify workers’ cultural orientations and willingness to conform to corporate codes. However, our discussion of identity performance extends beyond these surface-level displays to encompass the myriad strategies that workers use to simultaneously signify their identification with corporate culture, shape their association with social identity groups, and respond to the pressures of cultural profiling at work. This holistic account of identity performance illustrates the extent to which cultural profiling infuses workers with a heightened sense of self-consciousness regarding all aspects of their cultural and status displays. This often invisible form of “shadow work”<sup>2</sup> serves to comfort employers by signaling that employees are willing and able to fit into the corporate culture

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1. See, e.g., Camille G. Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

2. Devon W. Carbado & Mitu Gulati, *Symposium: Discrimination and Inequality, Emerging Issues Working Identity*, 85 CORNELL L. REV. 1259, 1307 (2000) [hereinafter Carbado & Gulati, *Working Identity*]; Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 720 (2001) [hereinafter Carbado & Gulati, *The Fifth Black Woman*]. See also generally Devon W. Carbado & Mitu Gulati, *The Economics of Race and Gender: Conversations at Work*, 79 OR. L. REV. 103 (2000) (investigating the ways in which employee speech and presentation impacts an employer’s perception of that employee’s ability to fit into the workplace and functions as a screening, signaling method) [hereinafter Carbado & Gulati, *Economics of Race & Gender*].

without making their employers uncomfortable with their cultural identity and occupational status.

## II. DEFINING THE PRACTICE: WHAT IS WORKPLACE CULTURAL PROFILING?

Workplace cultural profiling is the institutionalized practice of actively monitoring workers' behavior to assess how well they embody the values of their employing organization.<sup>3</sup> Workplace cultural profiling occurs whenever an employer searches for indicators of cultural fit or deviance within the organization. We focus on workplace cultural profiling in this article to illustrate how organizations serve as active agents that preserve certain values and cultural uniformity through formal policies and informal assessments of fit, threat, and deviance. Central to our discussion of workplace cultural profiling is the notion of bias. We acknowledge that, in many cases, firms that engage in workplace cultural profiling do not consciously aim to discriminate against any particular worker or group of workers. These firms argue that they create neutral policies that require uniformity and conduct ongoing screening to determine compliance with such policies, in order to serve the interests of their customers (who are drawn to their brand), shareholders (who expect the firm to generate profit), and employees (who benefit from cohesion and predictability). However, deconstructing the underlying intent and impact of seemingly neutral practices reveals how workplace cultural profiling functions to target and marginalize certain workers based on negative stereotypes of cultural differences, values, and style.

To capture the full scope and impact of cultural profiling practices, it is important to acknowledge the layered meanings of "culture," which serve as signals for deviance or compliance. At the organizational level, culture refers to the core values and standards for behavior within an organization or other collective that all members are expected to adopt.<sup>4</sup> At the societal level, culture refers to core values and behavioral standards that vary according to one's geographic location, social class, race, ethnicity, gender, religious orientation, generation, and other identities that take on a distinctive meaning and status within a given society. As individuals carry aspects of their cultural backgrounds into their workplaces, diverse subcultures often coexist within and, at times, shape the organization's culture. Nevertheless, an organization's culture is, in large part, an artifact of the values, beliefs, and preferences of the

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3. See Carbado & Gulati, *Working Identity*, *supra* note 2, at 1275 (arguing that organizations and senior management communicate what they value to employees and this, in turn, pressures them to engage in "effort-suggestive actions" to signal that they will behave in ways that are consistent with interests of the management at the firm. In turn, employers reward employees who successfully demonstrate that they have internalized the cultural norms of the institution). Carbado and Gulati also argue that the employer screens the employee's statements and behavior to evaluate whether the employee has certain characteristics that the employer values. *See id.* at 1269.

4. As part of organizational culture, norms are generally agreed upon informal rules that guide group members' behavior, by designating which behaviors are appropriate in a given context. Norms are critical for increasing predictability among group members, expressing values and clarifying the distinctiveness of the group, avoiding embarrassment among group members and facilitating the survival of the group. Daniel C. Feldman, *The Development and Enforcement of Group Norms*, 9 ACAD. MGMT. REV. 47, 47-48 (1984).

identity groups that have historically dominated the firm.<sup>5</sup> Thus, strict grooming codes constrain certain aspects of minority groups' culture that take on a unique importance within the larger society and privilege the values and culture of the dominant groups in the firm. These prohibitions impose a discriminatory burden on minority employees that makes it virtually impossible for these employees to have the chance to equally contribute to the corporation.

#### A. Why Do Firms Engage in Workplace Cultural Profiling?

Employing organizations engage in workplace cultural profiling to control workplace culture. Firms claim that controlling culture enables them to control branding (i.e., the marketing of their products and the delivery of their services) and to control social dynamics in the workplace by fostering cohesion.<sup>6</sup> Most businesses have not shown how a pluralistic workplace environment interferes with the firm's profit motives. However, firms justify monitoring and regulating employee appearance by claiming that they must present to their customers a professional-looking workforce or one that appeals to consumer preferences. On this basis, courts have largely supported formal policies that require uniform appearance standards for employees, particularly in the service industry.<sup>7</sup> In our discussion of workplace cultural profiling, we focus our attention on the firm's desire to foster cohesion and commitment among its workforce. Through this lens, the hidden costs of workplace profiling are revealed; in an attempt to control social dynamics, workplace cultural profiling in culturally-diverse organizations can compromise the very cohesion and performance that it was designed to promote. Strict grooming codes undermine trust and send a message to minority employees that their cultural displays, beliefs and preferences do not conform to the corporate culture.

Employers have a vested interest in attracting and retaining individuals who are capable and committed citizens, willing to put the firm's interest above their own.<sup>8</sup> Talent-management systems are designed to select and reward such workers by promoting those employees who demonstrate competence and possess desirable traits such as full-time availability, a strong work ethic, loyalty, team spirit, and a willingness to make work the center of their lives. Although it is unrealistic to expect any one employee to fully embody these idealized characteristics, firms still use this model image as a metric to guide hiring and promotion decisions. Employees who do not demonstrate such

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5. Pushkala Prasad, *The Protestant Ethic and the Myths of the Frontier: Cultural Imprints, Organizational Structuring and Workplace Diversity*, in MANAGING THE ORGANIZATIONAL MELTING POT: DILEMMAS OF WORKPLACE DIVERSITY 129, 130 (Pushkala Prasad, Albert J. Mills, Michael Elmes & Anshuman Prasad eds., 1997); Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GEN & SOC'Y 139, 139 (1990) [hereinafter Acker, *Hierarchies*].

6. Rich, *supra* note 1, at 1247. See also generally Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007).

7. Stan Malos, *Appearance-Based Discrimination and Stereotyping in the Workplace: Whose Conduct Should We Regulate?*, 19 EMP. RESP. & RTS. J. (forthcoming 2007).

8. WILLIAM H. WHYTE, *THE ORGANIZATION MAN* 171 (1956). See also Mary Blair-Loy, *Work Devotion and Work Time*, in FIGHTING FOR TIME: SHIFTING BOUNDARIES OF WORK AND FAMILY 292 (Cynthia Fuchs Epstein & Arne Kalleberg eds., 2004).

characteristics may be evaluated poorly, denied promotions or raises, or even terminated from the firm. Thus, firm-wide performance-management systems create an incentive for all employees to present themselves as skilled, loyal workers who will put forth tremendous effort to maximize the performance of their team and organization as a whole, even at the expense of their personal lives.<sup>9</sup>

Identifying “ideal workers” and preserving a uniform corporate culture has become increasingly complicated in the competitive, culturally-diverse marketplace. Firms face competing demands of predictability and innovation, which requires them to optimize efficiency of production and delivery processes while simultaneously developing new products and services.<sup>10</sup> In order to ensure cohesion, stability, and control while executing this complex business strategy, many firms intensify their efforts to attract and retain individuals who conform to the corporate culture and possess the characteristics of the ideal worker. At the same time, firms seek to increase employee diversity in order to comply with legal pressures, market forces, and moral demands to develop workers from various cultural backgrounds.<sup>11</sup> These competing desires for predictability (via conformity) and innovation (via diversity) create tensions within many organizations around identifying “ideal workers.” While firms screen vigilantly for indicators of fit, it is less obvious which individuals in a heterogeneous workforce possess the values and stylistic preferences that are aligned with corporate culture. As such, workplace cultural profiling becomes even more important in a diverse, competitive marketplace—rather than assume that all employees are committed to the firm’s values, managers vigilantly monitor their workers’ behavior to determine whether they fit into the firm and buy into the firm’s vision, policies, and practices. Workplace cultural profiling intends to enhance productivity and reinforce cohesion within an organization by singling out those individuals whose deviance may threaten the firm’s culture and long-term sustainability.<sup>12</sup>

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9. For example, in particular situations where personal identity traits are not easily observable, employees feel pressure to “work their identity” to let their employer know that they possess attributes that the firm values. See Carbado & Gulati, *Working Identity*, *supra* note 2, at 1261. See also Herminia Ibarra, *Provisional Selves: Experimenting with Image and Identity in Professional Adaptation*, 44 ADMIN. SCI. Q. 764 (1999) (arguing that individuals consciously experiment with various personas at work until they find a persona that provides credibility as a capable professional while maintaining a sense of authenticity); Laura Roberts, *Changing Faces: Professional Image Construction in Diverse Organizational Settings*, 30 ACAD. MGMT. REV. 685 (2005) (reviewing strategies that workers employ to manage their “professional images” by displaying their competence, character and fit within the corporate culture).

10. Wendy Smith & Michael Tushman, *Managing Strategic Contradictions: A Top Management Model for Managing Innovation Streams*, 16 ORG. SCI. 522, 523 (2005).

11. See generally, e.g., ALISON M. KONRAD, CASES IN GENDER AND DIVERSITY IN ORGANIZATIONS 99 (2006) (reviewing the kinds of initiatives organizations have developed to increase the pool of its “members/stakeholders” and to respond to the needs of diverse consumers more effectively).

12. For a review of arguments defending employer rights to place constraints on workplace identity performance, see MICHELLE T. JOHNSON, WORKING WHILE BLACK: THE BLACK PERSON’S GUIDE TO SUCCESS IN THE WHITE WORKPLACE (2004) (claiming that, even in contexts where employees are not required to wear uniforms, employers can make demands on identity performance to set a tone of professionalism). See also RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 24–42 (1992) (contending that freedom of

Certain workers are more likely than others to meet skepticism and scrutiny regarding their fit and commitment to corporate culture. To screen for compliance and deviance from corporate culture, workplace cultural profiling relies upon categorization processes to determine who fits and who doesn't, and it uses stereotypes to distinguish which people are more likely to be loyal from those who are more likely to threaten cohesion and productivity. When leaders and managers engage in workplace cultural profiling, they privilege ideal workers who they believe will protect the organization's dominant culture and penalize those who they believe will do just the opposite. Most often, the corporate culture of United States organizations is infused with the values and preferences of white, heterosexual, Protestant, and educated males.<sup>13</sup> People who belong to these dominant identity groups are more likely to possess characteristics that appear, on the surface, to be consistent with the firm's values and standards for behavior. As a consequence, the seemingly neutral practices of workplace cultural profiling, designed to protect the organization's culture, single out members of historically disadvantaged, marginalized, and underrepresented groups.<sup>14</sup> When members of these non-dominant groups display aspects of their identity that reflect different cultural codes, such displays are often interpreted as threats to the core values of the firm that will undermine the cohesion and financial viability of the corporation.<sup>15</sup>

## B. Profiling Outside of the Workplace: Separating Criminals from Law-Abiding Citizens

Cultural profiling is similar to racial profiling in that it relies upon the appearance of social category identifiers signaling deviance and threat.<sup>16</sup> Police officers engage in racial profiling by targeting persons who they believe present a threat to the health and safety of the community, based on an officer's use of objective factors, subconscious motivations, and stereotypes. Such targeting occurs despite the fact that this practice disproportionately affects African

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contract is a fundamental social norm, and that businesses that discriminate will lose out on talent and valuable resources to the organization, because it is irrational and disadvantageous to the company's bottom-line to continue to engage in such behavior); WILLIAM WINES, *ETHICS, LAW, AND BUSINESS* 300, 300 (2006) (discussing that "[h]aving the proper style, appearance, and manner of team play allows the manager to put others at ease").

13. America has had a long and painful history of infusing masculine characteristics into seemingly neutral organizational practices and abstract conceptions of the ideal worker, see generally Acker, *Hierarchies*, *supra* note 5. See also Joan Acker, *Gendering Organizational Theory*, in *GENDERING ORGANIZATIONAL ANALYSIS* 248, 248 (Albert J. Mills & Peta Tancred eds., 1992).

14. See, e.g., Rich, *supra* note 1, at 1192 (asserting that employers frequently proffer race-neutral reasons or policies for constraining race/ethnicity based conduct, describing these practices as "unprofessional" and "dirty" in order to simultaneously portray a pluralistic and antiracist identity, while reinforcing one's own group position at the expense of negatively stigmatizing the identity of outgroup members).

15. Carbado & Gulati, *Working Identity*, *supra* note 2, at 1307. See also Rich, *supra* note 1, at 1142.

16. See Christopher Edley, Jr., *The New American Dilemma: Racial Profiling Post-9/11*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 170, 170-73 (Richard C. Leone & Greg Anrig eds., 2003).

American and other minorities.<sup>17</sup> Certain minority groups are profiled more frequently than others because they are stereotyped as deviant, threatening, and criminal. For example, African American men are more likely to be stopped by police officers on routine driving checks, and non-white shoppers are more likely to be followed in stores and accused of shoplifting.<sup>18</sup>

The use of profiling in criminal law-enforcement has become more widespread since September 11, 2001. Post-9/11, more Americans support the need for aggressive measures in law enforcement, even though these measures give law enforcement broad discretion to target racial and ethnic minorities based on perceived threats.<sup>19</sup> Scholarship has also explored how post-September 11 immigration restrictions have had a disparate impact on immigrants, effectively amounting to thinly veiled attacks against racial and ethnic minorities.<sup>20</sup> Proponents of profiling argue that racial and ethnic profiling should be employed by law enforcement so long as they are statistically relevant.<sup>21</sup> As a consequence, many racial-profiling practices are considered legitimate, even if the officer's judgment calls are motivated by racism and animus against members of stereotypically deviant groups.<sup>22</sup>

The failure of courts to prohibit racial and ethnic profiling in retail establishments, in the workplace, and in law enforcement continues to reinforce

17. See FREDERIC SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 175–98 (2003) (arguing that, while the use of generalizations, profiles, and stereotypes are defensible, spurious factors like race and gender have been used to target women and racial minorities in law enforcement based on racial hostility and the employ of race as a proxy for criminality); Susan M. Akram & Kevin Johnson, *Race, Civil Rights, and Immigration Law After September 11 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Am. L. 295, 300 (2002) (maintaining that, after September 11, Americans are more willing to accept stringent security measures that target racial and ethnic disempowered minorities); David Harris, *The Stories, The Statistics, and The Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 300 (1999) (showing that, while pretextual traffic stops do net some criminals, "innocent blacks are imposed upon through frightening and even humiliating stops and searches far more often than the guilty").

18. For a discussion of what might be characterized as "shopping while black," see Devon Carbado, *Straight Out of the Closet: Race, Gender and Sexual Orientation*, in CROSSROADS, DIRECTIONS, AND NEW CRITICAL RACE THEORY 221, 231–32 (Francisco Valdes, Jerome M. Culp, & Angela P. Harris eds., 2002) ("When I walk into a department store, my identity signifies not only that I am Black and male but also that I am a potential criminal"). Carbado discusses several "race-negating strategies" that African Americans employ while shopping, including wearing conservative attire, stating the name of a famous designer, immediately seeking out white sales associates for assistance, or purchasing an expensive item right after one enters the retail store. See *id.*

19. See Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DePaul L. Rev. 849, 867–68 (2003) (discussing that, right before the attacks of September 11, the federal government publicly condemned racial profiling of African-Americans and noted that racial minorities were more frequently stopped because of their perceived propensity for crime).

20. *Id.* at 851–52.

21. See Schauer, *supra* note 17, at 189 (positing that "[u]nder some circumstances race or ethnicity, even though likely to be overused, will be sufficiently statistically contributory that precluding their use may produce some net decrease in law-enforcement effectiveness").

22. Harris, *supra* note 17, at 310–11 (arguing that *Whren v. United States* represents a trend in the expansion of police discretion and power over vehicles, drivers and passengers, where the Court ruled that police can use traffic stops as a pretext for a variety of non traffic enforcement purposes, even those instances where suspicions may have no relation to traffic enforcement, and there is no clear evidence of criminality to justify those suspicions).

negative stereotypes against blacks and other racial minorities by giving dominant groups considerable discretion to act upon negative stereotypes. For example, even though statistical discrimination and “associational” or “consequential” animus has established that car sales people engage in “retail profiling,” retail car sales remain “highly deregulated and decentralized.”<sup>23</sup> In the face of the courts’ reluctance to restrain profiling, minorities are often subjected to heightened scrutiny and discriminatory treatment in public spaces. Minorities who exhibit stereotypically deviant or criminal behaviors (e.g., women of color browsing slowly through store aisles or men of color driving at high speeds in wealthy neighborhoods) are perceived as potential threats to community safety. In the absence of judicial oversight over racial profiling, innocent people suffer the burdens of negative stereotyping and discriminatory animus on a regular basis.

### C. Cultural Profiling Practices in the Workplace

Cultural profiling differs from racial profiling in scope and severity. Cultural profiling is employed with the intent of preserving a uniform corporate culture in the workplace. All employees who are subjected to workplace cultural profiling are monitored for fit and deviance; our definition does not exclude dominant or majority group members from profiling. Racial profiling, on the other hand, is restricted to members of racial or ethnic minority groups who are targeted as likely suspects for past or future crimes.<sup>24</sup> We do claim that cultural profiling practices often have a similar effect of biased targeting toward marginalized groups.

Like racial profiling, those who engage in workplace cultural profiling justify their practices with a stated intent to protect society from the costs of deviance. Yet, we must acknowledge that the penalties of being falsely accused of a crime (e.g., imprisonment) are more overt and acute than the penalties of having one’s organizational commitment called into question or display choices constrained. Workplace cultural profiling likely has a cumulative effect on those who are repeatedly targeted as deviant and threatening; it may result in similar psychological distress and lifestyle constraints as racial profiling, but the immediate impact is often far more subtle than that of racial profiling. By relying upon neutral appearance codes and subjective evaluations of fit, firms are able to garner even more support than law enforcement and retailers for the implicit stereotyping and bias infused in workplace cultural profiling.

In the workplace, cultural profiling occurs through both formal and informal practices legitimated over time. Formal cultural profiling takes place during recruitment activities when interviewers screen candidates for critical-thinking skills, personality traits, and personal values, in order to assess their potential fit with job demands and organizational culture. People who fail to communicate that they would fit into the company’s culture are not invited to

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23. See, e.g., Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2369–71 (2003).

24. Johnson, *supra* note 19, at 867–68.



join a given firm.<sup>25</sup> However, even those candidates who are invited to join the firm are subjected to continual cultural profiling, as managers (and coworkers) screen employees' behavior and judge whether their conduct befits the organization's norms and values. Managers try to preempt deviance by identifying and chastising workers whose character, values, or behavior may not be consistent with the firm's culture.<sup>26</sup> Employees often receive formal feedback regarding their compliance with codes of conduct and degree of "fit" into corporate culture during performance evaluations, especially if managers have concerns about potential deviance.<sup>27</sup> These routine evaluations serve as a legitimate reason to engage in cultural profiling by scrutinizing past and current behaviors in search of evidence for corporate citizenship, commitment, and leadership potential.

Informal cultural profiling takes the form of daily observations of cultural displays via appearance, emotion, and group affiliations. Managers' and coworkers' subtle messages regarding the appropriateness of one's self-presentation serve as evidence that informal cultural profiling has occurred. Feedback about cultural fit can take the form of public observations, recommendations, rhetorical questions, and sincere inquiries. Several examples might be: (1) A new employee is told by her assigned mentor that her braided hairstyle may not be appropriate for an upcoming meeting with a conservative client. (2) During a lunch time conversation about the upcoming election, coworkers jokingly tell their peer that he cannot possibly support such a candidate, and that he must be the only Democrat in the office. (3) A secretary is admonished by her boss for playing R&B music in the office, because the radio is too loud and the music is unprofessional. (4) A woman of color receives a word of advice that the members of her project team would be more comfortable if she smiled more, while a man of color is advised to relax his handshake and speak more softly. (5) An African-American male professional is routinely greeted in the hallway by his senior colleagues with the seemingly friendly phrase, "Here comes trouble!" (6) A Muslim employee is asked if he *really* has to pray so many times each day. (7) A mother who leaves work to pick up her sick child is asked, "Are you leaving early *again*?" (8) A white male is teased by his male coworkers because his voice is soft, his hair is long, and his ear is pierced. These comments and questions serve as messages that one's own self-presentation is inconsistent with corporate culture. Notably, these remarks are less related to the company's formal mission statement or codified standards of

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25. Daniel M. Cable & Timothy A. Judge, *Interviewers' Perceptions of Person-Organization Fit and Organizational Selection Decisions*, 82 J. APPLIED PSYCHOL. 546 (1997) (finding that perceptions of organizational fit influenced hiring decisions).

26. Whyte, *supra* note 8, at 182; Patricia F. Hewlin, *And the Award for Best Actor Goes to . . . : Facades of Conformity in Organizational Settings*, 28 ACAD. MGMT. REV. 633 (2003) (describing the strategies employees use to feign conformity with organizational values, due to their fear of being identified as deviant).

27. Edward W. Jones, Jr., *What It's Like to Be a Black Manager*, 51 HARV. BUS. REV., July 1973, at 108 (describing his experience as a newly hired black manager in a large corporation). Despite having a Harvard MBA, Jones experienced heightened scrutiny and faced numerous challenges in establishing relationships with peers, subordinates, and supervisors. These challenges were reflected in his performance evaluations and feedback during the first year of his employment. *Id.*

professionalism, and more a reflection of subjective interpretations of what is typical, appropriate, and professional behavior.

We use the cultural profiling lens to illuminate a set of seemingly neutral practices that in fact reinforces the dominant culture and is directed at one of the impermissible basis of discrimination. The assumption that guides formal and informal cultural profiling practices is that cultural displays are an accurate indicator of one's character and competence (i.e., the extent to which one holds values that are consistent with the firm's values and possesses the skills to interact with colleagues and clients according to the behavioral norms of the workplace). By targeting workers whose cultural displays communicate a lack of conformity, cultural profiling discourages individuals from deviating from these taken-for-granted expectations. Moreover, cultural displays are often used as proxies for technical competence, despite the fact that they are an imperfect means of assessing whether an individual possesses the technical competence to perform her job capably.<sup>28</sup>

### III. IDENTITY PERFORMANCE AS A STRATEGIC RESPONSE TO WORKPLACE CULTURAL PROFILING

Most workers strategically enact their identities in order to signal to employers that they possess the requisite technical and social competencies as well as the firm's desired character traits.<sup>29</sup> Yet, certain employees must invest more effort than others in carefully signaling their competence and character. Cultural displays increase the salience of one's identification with a particular social category, making that social category the primary lens through which an individual is evaluated and increasing one's susceptibility to stereotypes regarding competence and character.<sup>30</sup> Such stereotypes may extend far beyond what a cultural display in fact symbolizes. For example, wearing an Afro in the workplace—a non-traditional hairstyle in corporate America—increases the salience of race and suggests that one endorses anti-establishment racial politics to fight against the dominance of mainstream culture. Wearing an Afro hairstyle increases the likelihood that one will be identified as a potential threat to cohesion within the firm and marketability of products or services to predominately white customers. By extension, wearing an Afrocentric hairstyle,

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28. Stereotypical expectations of the prototypical, legitimate employee are often based upon "peripheral characteristics," which are not necessarily related to individual effectiveness, yet are conceived to be essential for achieving success in organizations. See Taylor H. Cox & Stella Nkomo, *Differential Performance Appraisal Criteria: A Field Study of Black and White Managers*, 11 GROUP & ORG. STUD. 101, 104, 111 (1986).

29. Some strategies for signaling seriousness about one's work, trustworthiness, and gracefulness involve managing appearance by: dressing professionally (conventional, conservative, un-ornamental clothing in subdued or placid colors), having straight posture, wearing natural makeup and little jewelry, wearing short haircuts and no facial hair, maintaining eye contact, speaking articulately (with no accent and in a lower register), demonstrating confidence and composure, and refraining from emotional expression. See SUSAN MOREM, *HOW TO GAIN THE PROFESSIONAL EDGE: ACHIEVE THE PERSONAL AND PROFESSIONAL IMAGE YOU WANT* (1997); Anat Rafaeli et al., *Navigating by Attire: The Use of Dress by Female Administrative Employees*, 40 ACAD. MGMT. REV. 9 (1997); VICTORIA A. SEITZ, *YOUR EXECUTIVE IMAGE: THE ART OF SELF-PACKAGING FOR MEN AND WOMEN* 57-77 (1992).

30. Roberts, *supra* note 9, at 689.

such as an Afro, also heightens the proclivity for stereotyping about other aspects of black identity—namely, that one is less intelligent and less willing to work as hard as whites or blacks who wear chemically-straightened (i.e., relaxed or pressed) hair.<sup>31</sup>

Social identity group membership, in and of itself, does not inevitably trigger cultural profiling in the workplace. Rather, one is more likely to be the target of cultural profiling if her cultural displays increase the salience of a social identity group that has been stereotyped as deviant and/or incompetent.<sup>32</sup> As a consequence, members of negatively-stereotyped groups take great care in managing their self-presentation and cultural displays to ensure that they communicate competence, character, and commitment.<sup>33</sup> Identity-performance theory sheds light on how this construction of culture, competence, character, and commitment occurs in the workplace.

### A. The Social Construction of Identity

An important presupposition of our argument is that identity is not a “biological accident” but rather a social construction. Performance behaviors are not mere preferences and signs of personal taste, but they also reflect the aspects of one’s identity that are a function of social forces and societal institutions. Identity performance in the workplace involves strategically claiming certain aspects of one’s cultural background that reinforce corporate culture and suppressing other aspects that potentially conflict with corporate culture.

The social construction of identity implies that the meaning and significance of social-group membership is contested, negotiated, and recreated through interpersonal encounters in the workplace.<sup>34</sup> On one hand, historical

31. See generally Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL’Y 407 (2007).

32. Rich, *supra* note 1, at 1140.

33. Anderson offers examples of this in his study of executive-level minority employees in a major financial services corporation. As one minority executive in his study stated,

“once you get on that management track, either you change right away and start wearing different suits and different clothing or you never rise any higher. They’re never going to envision you as being a White male, but if you can dress the same and look a certain way and drive a conservative car and whatever else, they’ll say, this guy has a similar attitude, similar values. He’s a team player. If you don’t dress with the uniform, obviously you’re on the wrong team . . . It’s a choice.”

See Elijah Anderson, *The Social Situation of the Black Executive: Black and White Identities in the Corporate World*, in THE CULTURAL TERRITORIES OF RACE: BLACK AND WHITE BOUNDARIES 3, 17 (Michele Lamont ed., 1999). See also Judith A. Clair, Joy E. Beatty & Tammy L. MacLean, *Out of Sight but Not Out of Mind: Managing Invisible Social Identities in the Workplace*, 30 ACAD. MGMT. REV. 78, 78 (2005); Robin J. Ely, *The Power in Demography: Women’s Social Constructions of Gender Identity at Work*, 38 ACAD. MGMT. J. 589, 589 (1995); Laura M. Morgan, *The Nature, Antecedents, and Consequences of Social Identity-Based Impression Management: Strategies for Professional Image Construction in Cases of Negative Stereotyping* (2002) (unpublished Ph.D. dissertation, University of Michigan) (on file with first author).

34. See generally Acker, *supra* note 5; MATS ALVESSON & YVONNE D. BILLING, UNDERSTANDING GENDER AND ORGANIZATIONS (1998); Caroline Bartel & Jane Dutton, *Ambiguous Organizational Memberships: Constructing Organizational Identities in Interactions with Others*, in SOCIAL IDENTITY PROCESSES IN ORGANIZATIONAL CONTEXTS 115 (Michael A. Hogg & Deborah J. Terry eds., 2001); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); Carbadó &

power dynamics and resulting stereotypes create the foundation for how identity groups are experienced in the workplace, and whether categorization is socially valued or socially devalued.<sup>35</sup> On the other hand, individuals vary in the extent to which they psychologically and behaviorally identify with certain categories.<sup>36</sup> Individuals also differ in the degree to which they internalize the social valuation or devaluation of their identity group.<sup>37</sup> Belonging to stigmatized or socially-devalued identity groups does not mean that one personally ascribes to all of the negative connotations that society has associated with one's group. Many members of socially-devalued groups derive great pride from their group membership (as with black consciousness movements in the United States and South Africa during the eras of Jim Crow and apartheid, and as evidences in present-day gay pride parades).<sup>38</sup> Moreover, individuals serve as active agents in shaping the extent to which they are publicly identified with certain identity groups, and in shaping the social meaning that is associated with certain categories.<sup>39</sup> These behavioral attempts to communicate the desired meaning and significance of one's social identity groups constitute acts of identity performance.

## B. Cultural Displays and Identity Performance

Many other scholars in sociology, law, and organizational studies have written about identity performance. The term was popularized by Judith Butler in her consideration of the social construction of gender. It has since been broadened to refer to the intentional and unintentional behaviors that communicate one's identity and status in a social group. Some scholars have used the phrase identity performance,<sup>40</sup> while others have coined different phrases to describe such displays of social identities: working identity,<sup>41</sup> social identity-based impression management,<sup>42</sup> identity negotiation,<sup>43</sup> strategic

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Gulati, *Working Identity*, *supra* note 2, CHARLES H. COOLEY, HUMAN NATURE AND THE SOCIAL ORDER (1902); Kay Deaux & Kathleen A. Ethier, *Negotiating Social Identity*, in PREJUDICE: THE TARGET'S PERSPECTIVE 301 (Janet K. Swim & Charles Tangor eds., 1998); ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); CHARLES H. MEAD, MIND, SELF AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST (Charles W. Morris ed., University of Chicago Press 1967) (1934).

35. See generally Alison M. Konrad, Pushkala Prasad & Judith K. Pringle, *Examining the Contours of Workplace Diversity*, in HANDBOOK OF WORKPLACE DIVERSITY 1 (Alison M. Konrad, Pushkala Prasad & Judith K. Pringle eds., 2006).

36. See generally Marilynn B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERSON. & PSYCHOL. BULL. 475 (1991); Kay Deaux, *Reconstructing Social Identity*, 19 PERSON. & PSYCHOL. BULL. 4 (1993); Robert M. Sellers et al., *Multidimensional Inventory of Black Identity: A Preliminary Investigation of Reliability and Construct Validity*, 73 J. PERSON. & SOC. PSYCHOL. 805 (1997).

37. Jennifer Crocker & Riia K. Luhtanen, *Collective Self-Esteem and Ingroup Bias*, 58 J. PERSON. & SOC. PSYCHOL. 60, 60 (1990); Sellers et al., *supra* note 36, at 807.

38. William E. Cross Jr., *The Thomas and Cross Models of Psychological Nigrescence: A Literature Review*, 5 J. BLACK PSYCHOL. 13 (1978).

39. Roberts, *supra* note 9, at 694.

40. See Rich, *supra* note 1.

41. See Carbado & Gulati, *Working Identity*, *supra* note 2.

42. See Roberts, *supra* note 9.

43. See Deaux & Ethier, *supra* note 34; Kay Deaux & Brenda Major, *A Social-Psychological Model of Gender*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 89 (Deborah Rhode ed., 1990).

enactment of social identity,<sup>44</sup> identity management,<sup>45</sup> identity deployment,<sup>46</sup> and covering.<sup>47</sup> Most of these authors, with the exception of Rich<sup>48</sup> focus exclusively on the self-conscious and intentional behaviors that individuals perform in order to announce and enact who they are. Identity performance takes many forms, all of which shape others' perceptions of one's social group memberships and identification. While many scholars have focused primarily on appearance management and identity performance, we include multiple layers of identity disclosure in our discussion to capture the complexity of identity performance. In so doing, we hope to offer a more holistic account of workers' attempts to express that they embody the values of the firm, conform to employers' behavioral and stylistic expectations, and abide by the status constraints of the dominant and marginalized identities within the firm.

Individuals may choose to publicly claim or suppress their membership in any given social identity group, and as a result, may perform their identity in a way that increases or decreases the salience of that social identity. Some individuals are able to hide a social identity altogether, either due to the invisibility of the identity or their own ambiguous physical appearance. For example, light-complexioned African-Americans and Latin-Americans might pass for Caucasian-American,<sup>49</sup> homosexuals might pass for straight,<sup>50</sup> and physically-challenged workers might hide their impairment to pass for one with no apparent limits on mobility.<sup>51</sup>

Disclosure decisions extend beyond signaling group membership; people also strategically disclose the degree to which they identify with a social identity group to which they obviously belong.<sup>52</sup> For example, discussing participation in certain cultural or religious activities informs both co-workers and supervisors of the employee's degree of identification with a social-identity group. In other words, when people disclose their feelings about group membership and involvement in social-identity group activities, they communicate how important those identities are to their self-concept and daily living. Beyond disclosing group affiliation and involvement, people attempt to shape how others view them in light of social-identity group membership in many ways, including: educating others about the inaccuracies of group stereotypes; holding oneself up as a positive exemplar who does not embody the stereotypes of one's

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44. See Laura Morgan Roberts, Isis Settles & William Jellison, Predictors of the Strategic Enactment of Gender and Racial Identity (2006) (unpublished manuscript, on file with first author).

45. See Donna Chrobot-Mason, Scott B. Button & Jeannie D. DiClementi, *Sexual Identity Management Strategies: An Exploration of Antecedents and Consequences*, 45 SEX ROLES 321 (2001); Clair, Beatty & MacLean, *supra* note 33; Catherine Cassell & Sue Walsh, *Organizational Cultures, Gender Management Strategies and Women's Experience of Work*, 7 FEMINISM & PSYCHOL. 224 (1997).

46. See Douglas Creed & Maureen Scully, *Songs of Ourselves. Employees' Deployment of Social Identity in Workplace Encounter*, 9 J. MGMT. INQUIRY 391 (2000).

47. See Yoshino, *supra* note 1.

48. See Rich, *supra* note 1.

49. Kimberlyn Leary, *Passing, Posing and Keeping it Real*, 6 CONSTELLATIONS 1 (1999).

50. Creed & Scully, *supra* note 46.

51. Clair, Beatty & MacLean, *supra* note 33.

52. Carbado & Gulati, *Working Identity*, *supra* note 2.

group; playing into group stereotypes in order to accrue social benefits; or avoiding discussions of difference altogether.

All attempts to claim or suppress identities occur via strategic self-presentation. Many workers perform their identities through visible displays of physical appearance (e.g., hair, makeup, clothing, jewelry).<sup>53</sup> Workers also use symbolic gestures (e.g., displaying photos or cultural artifacts, engaging in cultural rituals)<sup>54</sup> to emphasize certain cultural orientations. Beyond these aesthetic characteristics, workers also use strategic verbal disclosures to shape perceptions of competence and fit.<sup>55</sup> Such statements can include: disclosures of social identities (e.g., disclosing that one is homosexual), disclosures of cultural or political group involvement (e.g., sharing leadership experience in social justice activities), endorsements of dominant group opinions (e.g., agreeing with one's boss on a business strategy or agreeing with coworkers about the harms of Affirmative Action policies), and expressions of support for workplace culture (e.g., telling recruits that the institution is an excellent place to work). These disclosures, or the lack thereof, shape perceptions of one's commitment to abstract principles or values such as courage, hard work, loyalty, race-consciousness, social justice, spirituality, and family life.

Public affiliations are also a means of identity performance; workers may strategically socialize with dominant-group members, while avoiding socializing with members of marginalized groups (e.g., not speaking to janitors or security guards, even if they belong to the same racial group; not participating in identity caucus workgroups or diversity taskforces; intentionally joining majority-group colleagues for golfing or after-work drinking), because they wish to avoid the stigmatization of being associated with lower-status workers or being accused of antisocial behavior.

Because identities confer status along with cultural orientations, identity performance also involves employing "comfort strategies" to put others at ease with cultural and status differences.<sup>56</sup> For example, many individuals engage in emotional labor, manipulating their public display of emotions, in order to

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53. Dress can be used to create an illusion of power in general, but also as a direct means of addressing stereotypes and avoiding disapproval. See Daniel C. Feldman & Nancy R. Klich, *Impression Management and Career Strategies*, in *APPLIED IMPRESSION MANAGEMENT: HOW IMAGE-MAKING AFFECTS MANAGERIAL DECISIONS* 67, 70 (Robert A. Giacalone & Paul Rosenfeld Kanter eds., 1991); see also ROSABETH M. KANTER, *MEN AND WOMEN OF THE CORPORATION* 211 (Basic Books 1977); see FLOYD DICKENS & JACQUELINE B. DICKENS, *THE BLACK MANAGER: MAKING IT IN THE CORPORATE WORLD* 246–49 (1991); Anderson, *supra* note 33; PATRICIA A. MCBROOM, *THE THIRD SEX: THE NEW PROFESSIONAL WOMAN* (William Morrow & Co. 1986); Rafaeli et al., *supra* note 29.

54. Jeffrey Sanchez-Burks, Emily Heapphy & Susan J. Ashford, *Cultural Impressions of Professionalism* (Ross School of Business Paper No. 1041, 2006) (finding that impressions of professionalism were influenced by cues of whether one appropriately minimizes personal referents at work by avoiding family photos and other artifacts on one's desk). ELLA L.J. BELL & STELLA NKOMO, *OUR SEPARATE WAYS: BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY* 169 (2001) (finding that African American female professionals would strategically display artwork and books on their coffee tables to reflect their racial identities).

55. Carbado & Gulati, *Conversations at Work*, *supra* note 2.

56. Carbado & Gulati, *Working Identity*, *supra* note 2.

appear non-threatening and to smooth or avoid conflict.<sup>57</sup> Others work extra hours and take on additional citizenship tasks to demonstrate that they are willing to sacrifice for the sake of the firm's productivity.

Before considering the implications of cultural profiling and identity performance in the workplace, we make the following qualifications to clarify our assumptions about identity performance. Our claims are consistent with some, but not all of the scholarship on identity performance.

1. *There is no such thing as a universally-authentic way of performing an identity.*

We do not intend to privilege one way of performing identity over another. Nor do we contend that being strategic about identity performance inevitably leads one to engage in authentic self-presentation. All variations of performance can reflect an authentic enactment of one's identity. Authenticity is based on the consistency between internal emotions and values on one side, and one's external expressions on the other. Claiming an identity that one does not personally value is as inauthentic as suppressing an identity that one does value in order to impress people at work. For example, it is inauthentic for a woman who does not identify strongly with the feminist ideal to present herself as a whole-hearted supporter of the feminist cause, just to be accepted by her female boss. As such, we believe that it is not possible for an outside observer to determine whether someone's identity performance is authentic or inauthentic. In either case, whether authentic or not, we believe that individuals should have the freedom to perform aspects of their identity however they choose, as long as the performance does not interfere with business practices or interfere with the rights or human dignity of other employees. We also acknowledge that, even though certain identity performances trigger multiple symbolic meanings for those who enact them, these meanings may be entirely separate from an observer's interpretation of such acts. It is therefore important to inquire about why an employer might constrain certain types of identity performances but welcome others to determine whether these standards are motivated by antipathy or discriminatory animus against marginalized social identity groups<sup>58</sup>.

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57. Expressed emotions are particularly powerful for managing one's image and putting others at ease. Andrew J. Morris & Daniel C. Feldman, *The Dimensions, Antecedents, and Consequences of Emotional Labor*, 21 ACAD. MGMT. REV. 986 (1996). For example, in the financial services industry, a mask of rationality is maintained at all costs because feelings are regarded as "dangerous". McBroom, *supra* note 44, at 61. Anger and cheer are the emotions that have received the greatest amount of attention in impression management literature, as they accompany job requirements. For example, paralegals are expected to absorb others' anger and to internalize their own. JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* 2 (1995). African Americans are also strongly advised to learn to "manage their anger," expressing it only when appropriate and constructive, so as not to play into stereotypes of hostility and emotionality. DICKENS & DICKENS, *supra* note 43, at 18. Simultaneously, African Americans invest energy into expressing cheer or happiness in order to generate a favorable persona at work. *Id.* at 26.

58. This claim comports with recent legal scholarship that argues that racial and ethnic identities are not single, static and fixed aspects of a given group, and that policies that place demands on identity performance are a form of subordination. See Rich, *supra* note 1, at 1192 (arguing that an employee should be able to secure the protection of Title VII when identity

2. *Identity performance can be constructive or destructive, depending upon the harm inflicted upon the self and others.*

Constructive identity performance facilitates self-disclosure of core values and fosters higher quality relationships within and between identity groups. Even if one accommodates one's personal style to fit into corporate culture, this may still be considered a constructive form of identity performance. Certain displays of identity are intended to reflect core cultural values (i.e., core expressions), and others are a matter of personal expression, which may or may not be related to one's culture (i.e., peripheral expressions).<sup>59</sup> Disclosing one's true feelings about social identification is different than unintentionally displaying characteristics that are generally associated with certain identity groups. The same set of behaviors can constitute core identity displays for some individuals, but peripheral displays for others. For example, one mother who returns to the workplace considers breastfeeding a core aspect of feminine identity; another mother who bottle-feeds may not feel the same way. Again, it is important to privilege the voice of the actor in determining the harm of certain constraints and expectations on identity performance. Manipulating or constraining the performance of core identity features is generally destructive, but manipulating peripheral expressions of identity may not be.

Even if identity performance enables authentic self-expression, it may still qualify as destructive if it offends others' dignity. Destructive identity expressions harm and denigrate both the members of one's own identity group and the "others" who view that behavior. For example, actions such as wearing paraphernalia at work that advertises membership in a hate group or ridicules other groups, chastising a male colleague for not being masculine enough, or condemning coworkers who hold different religious beliefs than one's own, may offend others. These types of displays should be restricted because they involve emotionally charged statements that pollute the workplace with discrimination, so as to destroy an employee's ability to fully contribute to the workplace.

3. *Identity-performance displays do not occur as singular acts, in isolation from one another, but rather as part of a pattern.*

Identity performance is an ongoing process, intended to reinforce or temper the messages sent through previous displays. Appearance displays take on different meanings depending upon the other identity-performance choices someone makes and the intersecting identity groups to which one belongs.

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performance traits are racially and ethnically coded, except when performance behaviors disrupt an employer's business or interfere with the rights of other employees); Devon & Gulati, *The Fifth Black Woman*, *supra* note 2, at 702 (explaining how a coherent theory of discrimination must take into account discrimination that is based on both status markers of difference and identity performance); Yoshino, *supra* note 1, at 772 (contending that pressures to cover, assimilate, "reverse cover," or perform one's identity in a stereotypical fashion perpetuate class subordination); Gowri Ramachandran, *Intersectionality as "Catch-22": Why Identity Performance Demands are Nether Harmless nor Reasonable*, 69 ALB. L. REV. 299, 303 (2005) (arguing that conflicting identity-performance demands, also termed "intersectionals," place certain groups in a "Catch-22" because they suffer the harm of having their choices restricted).

59. Rich, *supra* note 1, at 1185.



Certain patterns of behavior are considered more “professional” than others, depending upon the individual and the context. For instance, the behavior of a high school graduate who speaks in black-English, wears a purple hairpiece, and has a playful demeanor may not be coded as threatening if it is consistent with the dominant culture of the fast-food restaurant in an urban area where most other employees come from a low socio-economic status, have minimal education, and are less likely to speak “grammatically-correct” English. However, if an investment banker, who typically dresses conservatively, attended Ivy League schools, and is characterized as “articulate,” shows up to the bank’s annual picnic wearing a purple hair piece, this act of deviance would likely call into question her ability to fit into corporate culture. Likewise, a white male factory worker who is a union leader and is perceived as having an aggressive, overly-ambitious style will be viewed suspiciously if he offers a critical assessment of the firm’s culture and commitment to work-family-life balance. However, his white male counterpart who does not participate in the union and is labeled as a fast-tracker, may be viewed as compassionate and benevolent for making the same criticism.

When historically-disadvantaged and marginalized group members perform culturally-deviant identity expressions or criticize the dominant structure, these singular acts may signal to the firm that the employee has not internalized the values that the firm has defined as important. Thus, the work of identity performance is cumulative—future identity displays are interpreted in light of previous acts and identity-group expectations. Individuals who work in organizations where cultural profiling is prevalent remain vigilant in ensuring that their behavior over time is consistent with the image of competence and commitment that they have attempted to create.

4. *Everyone engages in some form of identity performance; however, identity performance requires more effort from members of historically-disadvantaged or marginalized groups than from dominant-group members.*

Cultural profiling practices involve scrutinizing workers’ behavior for signals of deviance. Because certain individuals’ cultural preferences are less consistent with the dominant corporate culture, they must expend more effort to embody these values, norms, and status expectations. For example, when United States-born workers take on overseas assignments, they must monitor their own behavior to ensure that they do not offend their non-American colleagues and clients due to their lack of exposure to the local culture. Identity performance requires even more effort and attention for members of negatively stereotyped groups, as they must demonstrate their competence and character, while at the same time, dispel negative stereotypes that may have been applied to them.<sup>60</sup>

At the same time, employees must be careful not to overtly disrupt the power structure within the organization. Even if they do not have to wrestle with negative stereotypes, members of marginalized groups are often in a

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60. Roberts, *supra* note 9; Carbado & Gulati, *Working Identity*, *supra* note 2.

double-bind when it comes to identity performance.<sup>61</sup> Members of marginal groups are viewed with skepticism and discomfort when they hold influential positions in the organization,<sup>62</sup> because the high status of their professional identity is inconsistent with the lower status of their other social identities. To comfort their coworkers, marginalized-group members often perform additional emotional, physical, and intellectual labor.<sup>63</sup> This extra work can undermine career advancement and reinforce subordination.

Given the ongoing nature of cultural profiling and identity performance in the workplace, and the differential amount of pressure it may place on certain groups in organizations, we question whether cultural profiling should be constrained on legal and ethical grounds. In the next section of the paper, we review the legal implications of workplace cultural profiling practices that dictate and monitor “appropriate” identity performance and fit.

61. See David Wilkins & Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 498 (1996) (discussing how seemingly race-neutral practices in hiring, training, and promotion disadvantage blacks). According to Wilkins and Gulati, after black associates are hired in a law firm, they report experiencing diminished opportunities for professional advancement. *Id.* at 541. This results when black associates either “seek to minimize the adverse consequences of their employer’s diminished expectations by avoiding situations where they believe that their competence might be called into questions” or they “take the opposite tack and invest heavily in their careers at the firm by taking on difficult or risky projects that, if successful, might induce the firm leaders to view them as superstars instead of merely as average.” *Id.* at 522–23. Both strategies adversely impact an associate’s opportunities for long-term success because they either take on too many or too few risky assignments in order to dispel negative stereotypes. *Id.* at 523. This double-bind that minority associates experience is intensified by law firms that have an “up-or-out” structure, where blacks and other minorities are less likely to have social contacts that can help them to navigate their careers, are unlikely to be mentored, and are disproportionately punished for their mistakes. See *id.* at 569–73. See also JOE FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 153 (1994) (stating that blacks and other minorities risk reprimand when they step out of the box or the invisible space that they are forced into in the workplace).

62. Jennifer A. Richeson, *Paradigms of Power: Social Stigma Versus Situational Status in Dyadic Interactions* (2000) (unpublished Ph.D. dissertation, Harvard University) (on file with Widener Library, Harvard University).

63. Edward W. Jones, Jr., *Black Managers: The Dream Deferred*, 64 HARV. BUS. REV., May 1986, at 84. Based on his research of over 200 black managers, Jones writes:

Most black managers feel that to satisfy the values and expectations of the white corporate hierarchy they must run a gauntlet of contradictory pressures. Running the gauntlet means smarting from the pain of prejudice even as white colleagues deny that your reality of race has any impact. It means maintaining excellent performance even when recognition is withheld. It means being smart but not too smart. Being strong but not too strong. Being confident but not egotistical to the point of alienation. Being the butt of prejudice and not being unpleasant or abrasive. Being intelligent but not arrogant. Being honest but not paranoid. Being confident yet modest. It means seeking the trust and respect of fellow blacks and acceptance by whites. Speaking out on issues affecting blacks but not being perceived as a self-appointed missionary or a unifaceted manager expert only on black subjects. Being courageous but not too courageous in areas threatening to whites. It means being a person who is black but not losing one’s individuality by submersion into a class of ‘all blacks’ as perceived by whites. Defining one’s self while not contradicting the myriad definitions imposed by white colleagues. Being accepted as a leader for whites and not being seen as an Uncle Tom by blacks. Being a person who is black but also a person who is an authentic human being.

*Id.* at 91–92.

#### IV. THE LEGAL IMPLICATIONS OF CULTURAL PROFILING: TITLE VII, CLAIMS, AND CASE LAW

While the law prohibits discrimination based on status identities, courts have refused to expand the ambit of antidiscrimination law in the workplace to prohibit workplace policies that place demands on identity performance.<sup>64</sup> Employees typically file discrimination claims using Title VII.<sup>65</sup> By failing to provide legal protection based upon identity performance, courts give employers unfettered discretion to develop ostensibly “neutral” workplace policies that place a burden on minority employees and provide a channel for dominant groups to target minorities in violation minority employees’ rights.<sup>66</sup>

Given the omission of identity performance from Title VII, individuals who have filed suits on the basis of discriminatory identity performance demands have obtained minimal support from the courts. Claimants have struggled to convince the courts of identity-performance discrimination under both disparate-treatment and disparate-impact doctrines. Disparate-treatment liability arises when claimants show that employers have developed policies and practices that intentionally disfavor workers with particular characteristics (i.e., race, sex, or national origin).<sup>67</sup> Disparate-impact liability is demonstrated when employers develop facially neutral practices that have the effect of disproportionately harming members of a particular group, and which are not related to job performance or based on business necessity.<sup>68</sup> In this view, disparate impact is in part comparable to a requirement that employers accommodate the needs of certain protected identity groups, such as employees with historically-stigmatized traits such as physical impairments.<sup>69</sup> Even under disparate-impact law, employees are often not able to overcome the evidentiary problem of proving unlawful animus.<sup>70</sup> Thus, disparate-impact law does not afford protection to groups’ voluntary characteristics; rather, it largely reinforces the legal protection that groups with immutable characteristics already receive under disparate-treatment law.

It might be helpful to illustrate this point by briefly discussing two cases that demonstrate the centrality of immutability in disparate-impact and disparate-treatment cases in Title VII law. In *Rogers v. American Airlines, Inc.*,<sup>71</sup> a case where the company prohibited employees in certain positions from wearing an all-braided hairstyle, the court equated the immutability

64. See Carbado & Gulati, *The Fifth Black Woman*, *supra* note 2, at 702; Ramachandran, *supra* note 58, at 300.

65. Title VII provides that employers who have fifteen or more employees are prohibited from using discriminatory acts, such as “fail[ing] or refus[ing] to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2000).

66. See, e.g., Rich, *supra* note 1, at 1249.

67. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 647 (2001).

68. *Id.*

69. *Id.* at 648.

70. See *id.* at 675–78 (describing the difficulty in successfully establishing a disparate impact claim).

71. 527 F. Supp. 229 (S.D.N.Y. 1981).

requirement to a “natural/artifice” distinction.<sup>72</sup> The court rejected the plaintiff’s disparate-treatment claim because (1) the particular hairstyle was not “exclusively or predominantly” worn by African-Americans; (2) the hairstyle was a preference and not the result of an immutable racial or ethnic trait; and (3) there was no requirement that the employee restyle her hair but was merely required to cover her hair with a wrap.<sup>73</sup> In the course of rendering its opinion, the court also commented that Rogers’s braids were not equivalent to an immutable cultural trait like the “Afro.”<sup>74</sup> Because Rogers chose to wear her hair in a style that violated company policy, her race-discrimination claim did not prevail.<sup>75</sup>

Here, the “natural/artifice” distinction fails because it does not appreciate the wide spectrum of cultural differentiation within subordinate communities, particularly the black community.<sup>76</sup> Additionally, although acknowledging that the “Afro” may be reflective of the socio-cultural essence of African American women, the court limits the ways in which black women may present their racial identity (i.e., permitting the employer to require women to put their corn-rows inside a bun and wrap the bun inside a hairpiece during the workday since the hairstyle is an artifice) and implicitly assumes that black women can wear their hairstyles in ways that are “natural” to white women without causing discomfort or offending a substantial interest.<sup>77</sup> This arbitrary distinction between “natural” v. “artificial” expressions merely constrains the choices that minority employees can make in presenting their identity in ways that are authentic to them, while reifying the dominant culture.

The court also refuses to acknowledge that the employee may have been wearing the all-braided hairstyle as an act of cultural distinctiveness—that is, to positively affirm black identity while making a political statement against the dominant culture. This is important, as an employee who wears a completely-braided hairstyle as an act of cultural distinctiveness is making a choice to wear the hairstyle, even if it does not conform to the expectations of the dominant culture. This choice can result in the employee being penalized for failing to assimilate. Rather than providing protection for employees who choose to perform their identity in multiple ways, the implication of the court’s ruling is that black women who step outside of the box of the “immutable” hairstyle—the “Afro”—and present their identity in a way that is not culturally accepted (i.e., the corn-row) will be targeted as deviant and a threat to the dominant culture.

The voluntary/involuntary framework in analyzing racial or ethnic identity performance was first introduced in *Garcia v. Gloor*,<sup>78</sup> where the court reasoned that only immutable identity features are entitled to protection under

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72. *Id.* at 232.

73. *Id.* at 232–33.

74. *Id.* at 232.

75. *Id.* at 233.

76. *Id.* at 233.

77. *Id.* at 233.

78. 618 F.2d 264 (5th Cir. 1980).

Title VII.<sup>79</sup> In *Garcia*, the court rejected a Mexican-American's disparate treatment and disparate impact national origin claims.<sup>80</sup> With respect to his disparate impact claims, the plaintiff claimed that the English-only rule deprived ESL (English-as-a-Second-Language) speakers the chance to communicate with each other in a language in which they were better at speaking, an opportunity already afforded to monolingual English-speaking employees.<sup>81</sup> *Garcia* argued that, because language is a mutable but fundamental part of his racial/ethnic identity, his employer's English-only rule discriminated on the basis of national origin.<sup>82</sup>

The court reasoned that there was nothing in Title VII's legislative history or common understanding that defined performance acts as features of national-origin identity deserving of statutory protection.<sup>83</sup> In so doing, the court used the immutability construct to protect the dominant English-speaking class while allowing employers and employees to stigmatize non-whites who speak in their native language as cultural deviants, and to punish them for attempting to bring their culture of origin into the workplace. These cases demonstrate that where claimants bring claims based on identity performance, the courts have employed the "natural/artificial" construct to endorse a class of persons who are believed to be deserving of legal protection, which are most likely members of dominant groups (i.e., white-male English speakers), rather than defending subordinate groups that are most in need of legal protection.

#### A. Title VII Cases and the Sex-Plus Factor

Even in cases involving "sex-plus" discrimination, Title VII typically applies to policies that discriminate on the basis of immutable characteristics, not mutable characteristics.<sup>84</sup> Courts have permitted Title VII claims based upon

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79. *Id.* at 269. Beginning in the 80s, the courts began distinguishing between claims relating to morphological race- and ethnicity-associated traits—so called "immutable traits"—and voluntary traits. The courts held that Title VII does not protect discrimination claims that relate to mutable or voluntary traits. *See generally* Rich, *supra* note 1.

80. *Garcia*, 618 F.2d at 264.

81. *Id.* at 268.

82. *Id.*

83. *Id.*

84. In order to establish a Title VII claim under the sex-plus rule, plaintiffs must demonstrate discrimination on the basis of sex and "either an immutable characteristic or the exercise of a fundamental right." *Arnett v. Aspin*, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994). *See also* *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (rejecting the lower court's sanctioning of a "one hiring policy for women and another for men—each having pre-school age children" under § 703(a) of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 255, *codified at* 42 U.S.C. § 2000e-2 (2000)); *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 804–05 (Iowa 2003) (ruling that an employer's unwritten personal-grooming code prohibiting men from wearing an earring or stud at work did not constitute discrimination based on sex because wearing an earring is not an immutable characteristic; the employee failed to contend that wearing an ear stud violated a fundamental right, nor did he show that the personal-grooming code perpetuated "sexist or chauvinistic attitudes in employment which significantly affected his employment opportunities"); *Garcia*, 618 F.2d 264 (arguing that an English-only policy is permissible against bilingual employees because bilingualism is a mutable characteristic, while monolingual individuals are protected under Title VII because their language is considered immutable").

sex and, in certain cases, other factors as well.<sup>85</sup> The sex-plus doctrine has been applied to discriminatory employment policies which infringe upon fundamental and protected rights (e.g., childrearing or marriage) or afford better employment opportunities to one sex over another based on unchangeable characteristics.<sup>86</sup>

Claims based on racial/ethnic identity performance discrimination do not fall within the court's narrow purview of "fundamental rights";<sup>87</sup> as a result, plaintiffs face a huge barrier in applying the sex-plus doctrine as an alternative legal remedy to support their claims of discrimination. Women, unlike racial and ethnic minorities, are differently situated because they are caught in a "Catch-22."<sup>88</sup> That is, once plaintiffs can show that gender played a motivating part in an employment decision, they can provide proof to show that an employment decision was made on the basis of a sex stereotype. Yet, the sex-plus doctrine does not provide legal protection to claimants whose performance behaviors impact the opportunities they receive as a member of one racial/ethnic group versus another.<sup>89</sup> The sex-plus doctrine protects certain voluntary traits if the challenges employment action was either intentionally discriminatory or had a discriminatory effect based on gender.

A few courts have begun to apply antidiscrimination law to claims involving intersectional identities such as claims of race and gender discrimination.<sup>90</sup> While courts do provide limited protection to mutable

85. *Weinstock v. Columbia Univ.*, 224 F.3d 33 (sex-discrimination claim); *Rogers v. Am. Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) (sex and race discrimination based on immutable traits); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (sex discrimination and discrimination based on marital status).

86. *See, e.g., Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1112 (ruling that Jespersen's objection to the makeup requirement did not establish a claim of sex stereotyping under Title VII since the policy applied to all bartenders, there was nothing in the record to prove that the policy interfered with women's ability to perform their job and it did not force women to conform to a sex stereotype of what they should wear to successfully perform their job); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755-56 (9th Cir. 1977) (preserving a policy that required men, not women, to wear ties); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (finding Azteca in violation of Title VII because they had a hostile work environment "because of sex" where abuse "reflected a belief that employee did not act as a man should act").

87. *See Jolls, supra* note 67 at 675-78.

88. *Price Waterhouse*, 490 U.S. at 251 (ruling that Title VII would not tolerate women being subject to the double-bind of conforming to male standards of excellence as well as having to perform their feminine identities in gender-stereotypical ways); Yoshino, *supra* note 1, at 914-15, 918.

89. The court concluded that the Title VII prohibition of discrimination on the basis of sex applies to men who are discriminated against for behaving too femininely, when the "abuse reflected belief that employee did not act as a man should act." Here, sexual harassment in the form of a hostile work environment violates Title VII because the abuse by male workers was because of the employee's sex, and behaviors that they believed were appropriate for a male employee. *See Manzollillo v. Cooke*, 438 F. Supp. 2d 311, 313 (S.D.N.Y. 2006) (holding that a supervisor's abusive taunts were sufficient to create a triable issue of fact as to whether sex-plus discrimination motivated the employee's dismissal, where plaintiff contends that she was unlawfully terminated based on her gender and appearance).

90. *E.g., Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (holding that "when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex" (emphases in original)).

characteristics under the sex-plus doctrine, most minorities who face discrimination based upon identity performance are not legally protected by Title VII unless they can prove gender discrimination.<sup>91</sup> Yet, the rulings on identity performance support an employer's right to dictate cultural values and the expression of these values and codes of conduct in the workplace. As a result, the courts reaffirm that cultural profiling practices are not discriminatory on the basis of disparate treatment or disparate impact even where facially neutral policies create a discriminatory environment that is tainted with racial and ethnic discrimination.

Those who critique the courts' rulings on cultural profiling argue that the mutable-immutable distinction is fundamentally flawed. Counterarguments are based on the primary assumption that identity is socially constructed and therefore, that a person's dress, attitude, and morphological features may constitute core features of an individual's cultural identity.

## B. Counterarguments on Title VII: Identity Performance and Intersectionality

Legal scholars who argue that certain practices are discriminatory due to the socially-constructed nature of identity ground their arguments in two theories: identity performance and intersectionality.

### 1. *Identity Performance*

Most identity-performance-discrimination claims fail primarily because courts distinguish between involuntary or immutable characteristics, which are protected by law, and voluntary or mutable characteristics, which are not protected. Studies in sociology, antidiscrimination research, and identity-performance theory contradict the involuntary-characteristics paradigm of social identity. These studies posit that individuals actively perform their identities, regardless of immutable traits.<sup>92</sup> Scholars who suggest that identities are socially constructed also claim that, although individuals have agency in identity expression, certain norms unfairly constrain the choices that non-dominant-group members can make by forcing them to cover certain aspects of their identity to avoid being targeted by the dominant culture.<sup>93</sup> Because dress, behavior, and other performance acts constitute one's socially-constructed identity, workplace constraints can be a kind of "negative class subordination"

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91. See, e.g., Ramachandran, *supra* note 58, at 301–02.

92. See Carbado & Gulati, *The Fifth Black Woman*, *supra* note 2, at 703 (claiming that, based upon the insights of intersectionality theory, performance demands must be taken into account in order to fully grasp one's susceptibility to intra-group distinctions); Rich, *supra* note 1, at 1200 (positing that, in the absence of unambiguous statutory definitions of race and national origin, courts have sought to fill loop-holes with judicial definitions supplied by Fourteenth Amendment equal protection doctrine, construing the statute to be intended primarily to address discrimination based upon immutable/natural/morphological characteristics).

93. See, e.g., Yoshino, *supra* note 1, at 772 (arguing that one of the effects of performance demands is the pressure that groups cover certain aspects of their identity that are negatively stereotyped in order to avoid animus and stigmatization); Ramachandran, *supra* note 58, at 309 (arguing that because intersectionals—individuals who possess characteristics of two or more social groups, see *infra* Part IV.A.2—subject to identity-performance demands are likely to have their choices restricted, some identity-performance demands deserve legal condemnation).

that should give rise to the scrutiny of legal prohibition. The harms of biased performance demands are two-fold: (1) such identity performance demands are harmful in and of themselves,<sup>94</sup> and (2) they restrict the choices certain individuals can make in performing their identity.<sup>95</sup> We find both perspectives persuasive.

Scholars who argue against identity-performance demands contend that purely mutable identity characteristics do not exist: One's public expression of identity is inextricably linked to one's self-concept, and discrimination based on appearance is a violation of one's rights.<sup>96</sup> Based on this view, courts err in distinguishing between voluntary and involuntary markers of a person's identity, given that discriminatory intent and motive in cases of supposedly immutable and mutable characteristics are the same for all intents and purposes. In either instance, the employer discriminates against an employee because she has stepped outside of the "invisible box" and triggered a cultural code that lets the dominant group know that the subordinate is not conforming to the so-called uniform workplace culture. Therefore, the employee is punished because her identity performances remind the employer of the employee's low social-status and her potential to dislodge the "cultural hegemony of the workplace."<sup>97</sup> Other scholars claim that the same biases that lead to discrimination on the basis of race and gender, for example, lead to discrimination based on race and gender identity performance.<sup>98</sup>

Courts have held that an employer will be held liable only when he targets an employee for involuntarily displaying morphological/immutable characteristics. This has permitted employers to use "neutral" grooming codes to disproportionately target marginalized groups based on cultural displays and to downplay the deleterious effects that such practices have on minority group workers' mental health and workplace engagement.

## 2. Intersectionality

Legal scholars have challenged the single-axis framework offered by the courts when focusing on discrimination brought by claimants possessing multiple low-status identities.<sup>99</sup> Over a decade ago, Kimberlee Crenshaw brought the concept of "intersectionality" into legal scholarship.<sup>100</sup> Intersectionality is the notion that particular social groups are constituted by multiple status identities and the different status holders within a group

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94. See Yoshino, *supra* note 1, at 772.

95. See Ramachandran, *supra* note 58, at 309.

96. See Rich, *supra* note 1, at 1134 (arguing that discrimination based upon voluntary and involuntary characteristics is virtually identical since identity is socially constructed); Carbado & Gulati, *The Fifth Black Woman*, *supra* note 2, at 701.

97. See Rich, *supra* note 1, at 1141–42.

98. See *id.*

99. See Carbado & Gulati, *The Fifth Black Woman*, *supra* note 2, at 703.

100. See Kimberlee Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141–52 (1989) (discussing how using "single axis frameworks" when adjudicating discrimination claims filed by black women creates an anti-racist problem).



encounter different forms of discrimination.<sup>101</sup> According to Crenshaw, using the traditional legal frameworks to determine whether discrimination has occurred is problematic because it primarily focuses on just race or just gender, not the intersection of the two.<sup>102</sup> In essence, non-intersectionalist legal frameworks reduce racial discrimination against black women to equal the sum of discrimination against black men plus discrimination against white women.<sup>103</sup>

Under the theory of intersectionality, courts should pay particular attention to the specific status identities that individuals occupy to determine whether a plaintiff's discrimination arises from an inter-group or intra-group distinction. The law is inadequate because it prohibits discrimination based on "sex plus other factors," but it does not prohibit discrimination against individuals that occupy more than one low-status characteristic or identity, except in rare cases.<sup>104</sup> This logic applies to identity performance because it supports the notion that two individuals who belong to the same demographic group might face different experiences of discrimination due to their personal choices about identity performance.<sup>105</sup> For example, a firm might prefer Latina women to Latino men based upon how they choose to perform their identity (termed an intra-group distinction). It is also true that a firm might prefer to hire taciturn and naïve Latina women as opposed to loquacious, shrewd, candid, and religious Latina women, whose character traits might be characterized as conflicting with what the firm values. Because intersectionality does not capture the latter distinction, identity-performance theory must also be considered to appreciate the full extent of discrimination.<sup>106</sup>

We agree with those scholars who argue that courts should reexamine current definitions of race and cultural identities under Title VII and prohibit discrimination based on cultural-identity performance. Current definitions of identity inhibit serious consideration of the myriad forms of discrimination certain individuals may experience, based on social-category membership and expectations about what low-status groups should be required to do to advance their careers. By refusing to legally protect individuals whose identity performance violates workplace cultural norms, the courts legitimize cultural profiling as a non-discriminatory practice. To offer greater protection, certain aspects of identity performance should be considered within the purview of Title VII. While antidiscrimination laws should cover certain "aesthetic choices" that an individual makes in how to present her cultural and gender identity, it should also consider verbal and symbolic displays of gender and culture.

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101. See *id.* at 151–52.

102. *Id.*

103. See *id.*

104. Ramachandran, *supra* note 58, at 300–01 (discussing how identity performance demands differ from traditional forms of discrimination). In particular, Ramachandran shows the limitations on individual choices through the lens of intersectionals rather than through the lens of "anti-subordination theory, critical theory or queer theory." *Id.* But see *Lam*, 40 F.3d at 1562 (ruling that "[w]hen Title VII plaintiff is claiming both race and sex bias, it is necessary to determine whether employer discriminates on basis of that combination of factors, not just whether it discriminates against people of same race or of same sex").

105. Carbado & Gulati, *The Fifth Black Woman*, *supra* note 2, at 703.

106. See *id.*

### C. Critiques of Identity-Performance Theory

Scholars have criticized identity-performance theory along two lines: (1) anti-essentialism arguments and (2) slippery slope arguments.<sup>107</sup> We acknowledge these claims and offer our interpretations based on our definitions of cultural profiling and identity performance.

#### 1. *The Anti-Essentialist Argument*

The anti-essentialist argument maintains that characterizing a form of identity performance as relating to one group amounts to a kind of subordination and essentializing of difference.<sup>108</sup> Based on this view, restrictions on identity performance are permissible out of fairness. Limiting the demands placed on identity performance would require the court to designate certain cultural traits as essential to a particular group and thus worthy of protection.<sup>109</sup> According to Gonzales, this definition would legitimize one version of a group identity above all others while reinforcing the notion that groups possess a defined “essence.”<sup>110</sup>

In contrast, we believe that recognizing identity-performance-based discrimination does not necessarily privilege certain versions of a group identity. We believe the identity constraint, not the legal protection, privileges one identity above others. Because cultural identities are fluid and heterogeneous categories, prohibiting cultural profiling does not essentialize certain aspects of group identity as normative. Rather, it counters an essentializing impulse in workplace environments that privileges certain aspects of a group’s identity as normative, appropriate, non-threatening, and professional. Just because the law recognizes certain traits as racially- and ethnically-coded does not mean that those traits take on an essentializing dimension within protected communities.<sup>111</sup> Moreover, the absence of legal protection for identity-performance behavior breeds animus and perpetuates power differentials, not the expansion of legal protections. Legal indifference

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107. See Ramachandran, *supra* note 58, at 306–13.

108. See Roberto Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2207 (2003) (arguing that Yoshino attempts to overcome “antidiscrimination law’s preoccupation with immutability by displacing it into the language of racial essences”). Gonzalez proffers four reasons why certain groups should not be granted cultural rights against a backdrop of compulsory assimilation based on the based on the proposition that said rights are central to a person’s identity. See *id.* at 2210. First, it pressures stigmatized groups to identify their cultural experience in a way that can be recognized by the law. See *id.* at 2210 (citing Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown & Janet E. Hally eds., 2002)). Second, descriptions of cultural identity have the effect of setting norms in how group members ought to behave. See *id.* (citing K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, in PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN DISCRIMINATION LAW 64 (Robert C. Post ed., 2001)). Third, increased cultural rights may stigmatize group members and expose them to heightened scrutiny. See *id.* (citing Ford, *supra*, at 52–53). Finally, cultural rights may undermine the rebellious of a group’s culture by forcing them to conform to the norms of acceptable behavior. See *id.* (citing WENDY BROWN, STATES OF INJURY 65–66 (1995)).

109. See generally *id.*

110. See *id.*

111. See Rich, *supra* note 1, at 1242.

signals to the dominant culture that it is acceptable, proper, and reasonable to stereotype and stigmatize subordinate groups. Finally, cultural rights do not undermine subversive impulses within groups, but rather deconstruct norms and policies that force marginalized groups to enact their identities in ways that reify the dominant culture. Because groups enact their identity in various ways, the expansion of cultural rights merely legitimizes minority group members' right to choose to enact their identity in ways that are authentic to them.

## 2. *The Slippery-Slope Argument*

The slippery-slope argument says that once one form of identity-performance demand is considered discrimination, *all* kinds of demands placed on cultural acts in the workplace will be considered discrimination.<sup>112</sup> This leads some to fear the end of any limits on workplace conduct. For example, if employers permit employees to wear braids as a cultural expression, then employees can argue that using obscene language and resisting the requirements to do one's job are cultural acts that should not be prohibited. We agree that prohibiting all forms of identity performance demands as discriminatory may open a Pandora's Box of performances that may be classified as "cultural acts." However, the fear that a Pandora's Box will be opened with the expansion of legal protections does not itself justify maintaining discriminatory constraints. Corporations need to develop democratic structures that allow all employees to contribute ideas and shape the developing workplace culture. Structures that privilege the dominant culture undermine the trust, loyalty, and teamwork that is necessary to sustain viable institutions. Policies that permit all employees to perform cultural traits that customs and context demonstrate are core to an individual's identity do not require that the law provide the same legal protection to persons who want to perform behavior in the workplace that is offensive and harmful to others. In other words, while we believe that Title VII should provide legal protections for culturally-coded performance behaviors, Title VII should not be used to thwart business interests or impinge upon the rights of other employees in order to give employees freedom to perform their identity. Yet courts and the public should reject certain workplace policies that constrain identity performance because, by legitimizing negative out-group stereotyping, employers can deter subordinates from fully contributing to workplace culture, which offends notions of human dignity and fair treatment.

In theory, the law should not define all of the acceptable ways that individuals perform their identity, but rather it should establish criteria that validate the various ways that individuals may express and legitimately enact their identities. For example, a black woman who straightens her hair, marries a white man, and attends an Ivy League institution is no less black than a black woman who wears cornrows, is outspoken about the firm's diversity policies, and chooses not to socialize with her white colleagues after work. However, when policies punish employees based on the choices they make in presenting their identity, the policies are discriminatory. As shown by this example, what

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112. See *id.*

constitutes racial and ethnic behavior can vary. Therefore, individual choice should not be arbitrarily restricted by concrete categories.

Our focus on antidiscrimination law reveals certain limits with respect to identity performance. Current laws prohibiting discrimination are based heavily on morphological models of race and gender, with the intent of punishing blatant acts of discrimination and harassment against racial, ethnic, and gender groups. Such blatant acts of discrimination occur far less frequently in work organizations today than when these antidiscrimination laws were first instituted. Instead, more subtle, aversive forms of discrimination occur in the forms of implicit biases<sup>113</sup> which are more likely to manifest in workplace cultural profiling. Recent social-psychological experiments provide widespread support for the claim that implicit biases shape decision-making in the public and private sphere.<sup>114</sup> According to this research, most Americans are cognitively disposed to associate negatively-stereotyped groups with negative behaviors or objects (e.g., blacks and weapons) and positively-stereotyped groups with positive behaviors or objects (e.g., men and intelligence), even when these same individuals state that they do not hold gender or racial biases. Implicit biases can have dangerous implications. As an extreme example, in 1999, Amadou Diallo was shot and killed by four New York police officers when they mistook him for a serial rapist and assumed that he was reaching for a gun when he was innocent and unarmed.<sup>115</sup> Workplace cultural profiling singles out certain members of identity groups on the basis of their identity performance and, using stereotypes, associates cultural deviance with threats to workplace cohesion and productivity. Workplace cultural profiling provides a venue for managers and colleagues to act upon implicit biases when interpreting others' identity performance displays and can lead to severe consequences when misattributions occur.

Without a serious consideration of ethical arguments in favor of an expansive antidiscrimination law, Title VII jurisprudence will remain mired in antiquated legal remedies for blatant acts of discrimination. At the same time, corporations and the courts will continue to depreciate the full extent of discrimination and devalue the psychological and dignitary importance of performance behavior. In the next section, we argue that cultural profiling is unethical because it offends basic notions of equal regard, fairness, and human dignity.

## V. THE ETHICAL IMPLICATIONS OF WORKPLACE CULTURAL PROFILING

In this section, we consider the circumstances under which cultural profiling should be considered legitimate, and when it should be considered a

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113. See generally Mahzarin R. Banaji, Max H. Bazerman & Dolly Chugh, *How (Un)Ethical Are You?*, 81 HARV. BUS. REV., Dec. 2003, at 56 (2003); Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986); Rich, *supra* note 1, at 1187.

114. See Mahzarin R. Banaji, Brian A. Nosek & Anthony G. Greenwald, *No Place for Nostalgia in Science: A Response to Arkes and Tetlock*, 15 PSYCHOL. INQUIRY 279 (2004). See Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447 (2005).

115. Robert D. McFadyen, *Diallo Shooting: The Overview*, NY TIMES, Mar. 27, 1999, at A1.

form of unjust discrimination. We carefully consider the ethical implications of cultural profiling separately from the legal rulings, to understand in greater depth the impact of these practices on social dynamics in the workplace. Ultimately, we believe that ethics should inform legal decision-making to ensure that antidiscrimination law fully appreciates the social, psychological, and moral harms of cultural profiling.

Ethics provide a framework to begin to understand the negative impact of workplace policies that scrutinize and constrain identity performance.<sup>116</sup> Developing laws that affirm equality, fairness and human dignity are worthy goals for any civil society.<sup>117</sup> Although there may be some relationship between laws and moral goals, it does not necessarily follow that what is legal equates to what is right; ethical norms should rise above legal standards.<sup>118</sup> Because the law provides the criterion for the “minimum standards of behavior” in a given society, individuals who fail to conform to this threshold are reprimanded.<sup>119</sup> By extension, legal rulings in favor of identity-performance demands do not provide sufficient proof for the morality of cultural profiling and its resultant identity-performance demands. In other words, just because courts have ruled in favor of identity-performance demands does not mean that cultural-profiling practices are morally acceptable. It is our view that the law and ethics should jointly inform policies and decisions about appropriate workplace demands for cultural displays.

#### A. The Limits of Utilitarianism as an Ethical Norm for Cultural Profiling

Theorists frequently justify identity-performance demands in the workplace as promoting the well-being and greater good of corporate America.<sup>120</sup> That is, a corporation must ensure that employees engage in behavior that it believes best approximates the values and norms that the firm identifies as central to its institutional identity. Utilitarianism claims that an act should be judged as moral or immoral based on whether it satisfies the needs or preferences of social actors.<sup>121</sup> In other words, cultural profiling is considered moral if it allows corporations to maintain a uniform culture which is necessary to maximize profit and meet the needs of a predominately white, male, Anglo-Saxon consumer base.

We question whether, in utilitarian terms, cultural profiling enables corporations to meet their desired ends of maximizing profit.<sup>122</sup> Even though

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116. See, e.g., DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002) (arguing that a core concern of ethical living is determining how one can achieve one's goals without compromising one's sense of identity).

117. See Wines, *supra* note 12.

118. *Id.*

119. *Id.*

120. See Johnson, *supra* note 12, at 81; Wines, *supra* note 12, at 300 (arguing that “success at networking . . . requires fitting into the style of the company so that others will be comfortable that the individual manager is one of them”).

121. See ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 115 (1991).

122. See Rich, *supra* note 1, at 1244 (arguing that proponents “claim that that the employer, as the creator of business opportunity, is entitled to regulate workplace ‘culture,’ regardless of whether her preferences actually related to the business purpose”).

cultural profiling protects the interests of the dominant culture, the burden and emotional harms that it imposes on minority workers undermine any of the benefits that justify its continuing existence as a legitimate workplace practice. Corporations may argue that cultural profiling enables them to meet the interests of their various stakeholders; by controlling values, standards of behavior, and service delivery, the corporation is better-positioned to accommodate consumer preferences and generate greater profits for shareholders. However, these benefits may not be sustainable for culturally diverse organizations; over time, the tax that cultural profiling levies on minority employees may, in fact, *harm* organizations more than it helps them. This reasoning is also flawed because it assumes that corporations have to project a uniform white-majority culture in order to market a particular corporate brand, which implicitly assumes that most customers are prejudiced, narrow-minded and ethnocentric.

Corporations intentionally hire and retain workers from various cultural backgrounds to enhance innovation and increase the bottom-line, largely because society has sent a message to corporations that diversity is a necessary goal.<sup>123</sup> Yet, corporations that adopt a color-blind philosophy and encourage employees to suppress cultural differences suffer increased conflict and decreased innovation, compared to corporations that value and leverage diversity to enhance organizational processes and outcomes.<sup>124</sup> Like color-blind philosophies, workplace cultural profiling challenges the expression of difference. It places individuals under the intense scrutiny of identity-performance displays, which can foster fear among employees that certain actions will be viewed or interpreted as confirming negative stereotypes. This concern with confirming negative stereotypes, or “stereotype threat,” interferes with employees’ ability to concentrate and execute job performance requirements.<sup>125</sup> In addition, employees who are subjected to intense cultural profiling may feel pressure to express behavior consistent with the dominant group, even if the behavior compromises workplace safety (e.g., exhibiting masculine and risky behaviors)<sup>126</sup> and to avoid associating with members of marginalized groups.<sup>127</sup>

Those organizational members whose cultural styles more closely approximate the dominant corporate culture may experience greater freedom to authentically enact their identities and to express divergent viewpoints, even when workplace cultural profiling is prevalent. However, marginalized workers who are targets of workplace cultural profiling may be less willing to share

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123. Taylor Cox & Stacy Blake, *Managing Cultural Diversity: Implications for Organizational Competitiveness*, 5 ACAD. MGMT. EXECUTIVE 45 (1991). Deborah R. Litvin, *Diversity: Making Space for a Better Case*, in THE HANDBOOK OF WORKPLACE DIVERSITY 75 (Alison M. Konrad, Pushkala Prasad & Judith K. Pringle eds., 2006).

124. Robin Ely & David Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229 (2001); David Thomas & Robin Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, 74 HARV. BUS. REV., Sept. 1996, at 79.

125. Claude Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613 (1997).

126. Irene Padavic, *The Recreation of Gender in A Male Workplace*, 14 SYMB. INTERACTION 279 (1991).

127. Roberts, *supra* note 9.

novel ideas for fear that their contributions will be taken as signals of threat and deviance.<sup>128</sup> Cultural profiling may also pressure these workers to perform their identities in inauthentic ways, by concealing their cultural identities and managing their emotional displays to make others comfortable. These forms of inauthentic self-presentation generate stress and anxiety for individuals.<sup>129</sup>

In sum, cultural profiling practices ultimately backfire in enabling organizational effectiveness. They succeed, however, in reproducing cultural hegemony in organizations, by requiring all employees to display their identities and emotions according to the stylistic preferences and values of the dominant culture, while dismissing marginalized performance behaviors as matters of “personal preference” that an employee can readily alter.<sup>130</sup> When workplace cultural profiling is prevalent, firms expect workers to subordinate their identities to that of the firm when conflicts arise between their own cultural identity and the firm’s norms. Rather than achieve the intended cohesion, which is necessary to maximize productivity, cultural profiling often creates deeper tension and reinforces the fault lines that exist between dominant and subordinate groups.<sup>131</sup> These underlying tensions between culture identity groups undermine firms’ profit maximization goals by disrupting cohesion, breaching trust among coworkers, and suppressing creativity.<sup>132</sup>

## B. Equal Regard as an Ethical Criterion for Cultural Profiling

Utilitarianism addresses the question of whether cultural profiling meets desired ends. An informed social ethic argues that an act cannot be justified on the grounds of its general utility alone.<sup>133</sup> The ethical principle of equal regard says that workplace relationships should be characterized by mutual respect, practical assistance, and fairness.<sup>134</sup> Using the standard of equal regard, discrimination can be considered harmful even if it promotes the well-being and greater good so long as it offends the interests of any group. A workplace relationship based on equal regard values and supports all identities without distinction.<sup>135</sup> Policies that privilege certain core cultural traits over others (e.g., cultural dress, character traits, and speech acts of the dominant group) violate an individual’s freedom of expression, human dignity, and self-respect.

128. Jones, *supra* note 27.

129. Ella L. Bell, *The Bicultural Life Experience of Career-Oriented Black Women*, 11 J. ORG. BEH. 459 (1990); Chrobot-Mason, Button & DiClementi, *supra* note 45; Karen Pugliesi & Scott L. Shook, *Gender, Jobs, and Emotional Labor in a Complex Organization*, in SOCIAL PERSPECTIVES ON EMOTION 283 (Rebecca J. Erikson & Beverley Cuthbertson-Johnson eds., 1997).

130. See, e.g., *Earwood v. Cont’l Se. Lines*, 539 F.2d 1349, 1351 (4th Cir. 1979) (holding that “discrimination based on factors of personal preference does not necessarily restrict employment opportunities” and therefore is not prohibited).

131. TAYLOR COX JR., *CULTURAL DIVERSITY IN ORGANIZATIONS: THEORY, RESEARCH & PRACTICE* 137 (1993); Thomas & Ely, *supra* note 124.

132. See BELLAH ET AL., *supra* note 121, at 94 (who argue that companies where employees trust one another and enjoy working together will generate more creativity and productivity than firms where employees do not collaborate effectively).

133. See BELLAH ET AL., *supra* note 121, at 5.

134. See, e.g., R.S. DOWNIE & ELIZABETH TELFER, *RESPECT FOR PERSONS* 50 (1970).

135. See *id.* at 51.

Institutional practices that code certain aspects of an employee's identity as deviant and threatening are unethical because they disrespect non-dominant cultural expression by constraining choices. We believe that this principle is consistent with the principle of equality of opportunity, which Title VII was designed to protect, because both principles are concerned with creating the maximum conditions where all groups can have the chance to compete and flourish in the workplace.

Cultural profiling, and the constraints it poses on identity performance, pollutes the workplace with discriminatory animus such that minority groups are denied the opportunity to fully contribute to the workplace. It is also important to consider that the desire to maintain a "uniform culture" is itself problematic: the choices one makes about how to display her identity do not determine whether she fits within the narrowly-defined values of the firm or whether she is competent to do her job. Organizations claim they have a right to select employees whose personality and preferences "fit" into job requirements and corporate culture. Such practices do not permit managers to accurately assess competence or core values; instead, they encourage managers to rely upon identity performance as a proxy for morality and commitment. This practice encourages dominant groups to target minority groups who do not comply with uniform standards, and the emotional toll this takes on minority groups makes it virtually impossible for them to maintain the focus necessary to be maximally productive workers.

Over time, cultural profiling not only interferes with the ability to accurately assess competence, but also reinforces a culture where deviance of any type is feared. Managers and employees may concentrate an inordinate amount of attention on profiling identity performance, which can lead people to interpret all behaviors as signals of resistance or compliance. When cultural profiling is prevalent, even culturally-valued behaviors are considered potential indicators of deviance that may threaten the organization. For example, people begin to misinterpret well-intentioned attempts to contribute novel ideas as evidence of subversion, instead of viewing them as enablers of innovation. Character traits can be misconstrued as well; passion may be coded as anger instead of enthusiasm; ambition may be seen as a harbinger of mutiny rather than a genuine desire to grow. Silence becomes an indicator of loyalty. These misinterpretations serve to marginalize individuals who seek to effect structural or cultural change.

Cultural profiling is also troubling because it disproportionately targets marginalized subgroups, reinforcing stereotypes, and creating further marginalization.<sup>136</sup> Not unlike racial profiling, certain employees are disproportionately scrutinized for deviance. As a consequence, members of marginalized, subordinated, and underrepresented groups often expend more effort than dominant groups to perform their identities at work, given that their cultural backgrounds often deviate from the norms of the corporate culture.<sup>137</sup> Individuals who choose to conform and those who do not both bear the consequences of having their identity performance and commitment held under

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136. Rich, *supra* note 1, at 1249.

137. See Carbado & Gulati, *Working Identity*, *supra* note 2, at 1262.



constant scrutiny. Such monitoring may lead marginalized workers to engage in extra-role behaviors to prove their loyalty and citizenship,<sup>138</sup> but which may ultimately undermine their performance.

Minorities, women, and lower class workers face another obstacle in that they may have less access to mentors and other influential people in organizations,<sup>139</sup> and therefore have fewer people to assist them in learning how to selectively internalize aspects of the corporate culture without becoming less authentic. As stated earlier, a lack of authenticity is costly for the individual and for the organization because it creates a culture where minority employees contribute below their potential.<sup>140</sup> When differences are suppressed and feared, creativity, critical thinking, and innovation are hindered. While we believe that the principle of equal regard provides an important metric for workplace policies, the reality is that firms are a long way from creating environments based upon mutual respect, programmatic assistance and fairness for all employees. While this may be a worthy ideal, right now it is practical for corporations to cease practicing policies that burden minority groups based on negative stereotypes of cultural difference, and to foster the conditions for all groups to have the opportunity to contribute equally to the workplace without having to deny certain aspects of their identity that make them distinctive.

### C. Beyond the Business Case: Cultural Profiling and Social Responsibility

Corporations that engage in socially responsible decision-making recognize that all decisions in the area of the marketplace are not value-free.<sup>141</sup> By viewing marketplace decisions as value-free, managers and corporate officers cannot understand the implications of business in shaping the meaning of race by perpetuating social inequality.<sup>142</sup> Business decisions convey the priority of certain values and privilege the well-being and rights of certain groups over others.<sup>143</sup>

Cultural profiling is problematic not only because it offends notions of human dignity and violates core values of inclusion, but also because it might be motivated by socially-irresponsible practices. Although profits are important for the survival of business, corporations' goals extend beyond profit maximization to include contributing to the maintenance and construction of democratic

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138. *See id.*

139. Stacy Blake-Beard, Audrey Murrell & David Thomas, *Unfinished Business: The Impact of Race on Understanding Mentoring Relationships* (2006) (Working Paper, Harvard Business School), available at <http://hbswk.hbs.edu/item/5499.html>. *See also* Belle R. Ragins, *Gender and Mentoring Relationships: A Review and Research Agenda for the Next Decade*, in *HANDBOOK OF GENDER AND WORK* 347, 353–54 (Gary Powell ed., 1999) (suggesting that women receive less support from formal mentors in the workplace).

140. *See* Roberts, *supra* note 9, at 702.

141. *See* Moran, *supra* note 23, at 2369–75 (showing that even in competitive markets discriminatory animus and discrimination by proxy is used to harm women and people of color and reinforce negative stereotypes).

142. *See id.*

143. *See* Wines, *supra* note 12, at 43.

community.<sup>144</sup> In an increasingly global society, the drive toward production of goods and services should be balanced against other human interests to compensate for the tax advantages, public resources, and consumer base that society grants corporations.<sup>145</sup> This means that the purpose of a corporation was never merely to make money but to take into account the effect a particular business enterprise has upon the community as a whole. A global vision that is responsive to the needs of a global society recognizes that human beings are interdependent and intricately connected parts of a larger whole, rather than individualistic, competitive, and completely autonomous elements. Litvin describes the “better case” for diversity being one in which the return on investment will come in the form of additions to the world’s total stock of human capacities and the prospects for the survival of the human race.<sup>146</sup> This case is based upon the premise that the purpose of the organization is not just to maximize profits but to enhance human well-being, to contribute to the enjoyment of a life that provides meaning, and to foster a society that is just and transforming.<sup>147</sup> Corporations and managers should be active agents in creating a workplace culture based on the values of inclusion, fairness and human dignity which are in keeping with the democratic ideal. In many ways, a limitation of antidiscrimination law is that it has been applied using a “melting pot” model that pressures groups to assimilate aspects of their identity. A better way might be to see cultural diversity not as an unfair tax on the corporation but as a resource that permits corporations to produce rounded employees that do not perpetuate outdated prejudices and biases and are responsive to the needs of a diverse and interdependent global society.

This article suggests that it is appropriate for persons to express distinctiveness liberally, as long as it does not infringe upon the rights and liberties of other people. In fact, cultural diversity is the benchmark of American democratic traditions that affirm the humanity of the person, the love of

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144. James Boyd White, *How Should We Talk about Corporations?: The Languages of Economics and Citizenship*, 94 YALE L.J. 1416, 1418 (1985).

145. Howard Thurman, *Religion in a Time of Crisis*, in A STRANGE FREEDOM: THE BEST OF HOWARD THURMAN ON RELIGIOUS EXPERIENCE AND PUBLIC LIFE 124, 129 (Walter Earl Fluker & Catherine Tumber eds., 1998) (arguing that all members of society should recognize the core value of an interrelated structure of reality, meaning citizens should work toward a society in which the most disadvantaged groups “can find refuge and refreshment”). See also BELLAH ET AL., *supra* note 121, at 102.

146. See generally Litvin, *supra* note 123. Litvin’s argument counters a recent paradigm for viewing the economic benefits of workforce diversity. See Konrad, *supra* note 11, at 99 (discussing the business case for diversity). Because society is becoming increasingly diverse, corporations should reflect that diversity. See CORNELL WEST, DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM 100 (2004) (acknowledging Morrison’s core concern that “there can be democratic dialogue only when one is open to the humanity of individuals and the interiority of their personalities”). Yet, creating workplace diversity is not merely a matter of hiring; it involves developing institutional policies that increase minority retention, permitting minorities to shape and create workplace policies, fostering the conditions for greater numbers of minority promotions based on one’s ability to fulfill job requirements, and creating the social conditions within the firm for employees to feel comfortable performing core aspects of their identity without incurring costs. See generally Prasad, Konrad & Pringle, *supra* note 35; Thomas & Ely, *supra* note 124; Cox, *supra* note 131.

147. *Id.*

freedom, a commitment to justice, and a moral urgency to address the concerns of the disempowered. Ethical standards require corporations and organizations to be subject to democratic scrutiny concerning the ethics of business practices and the treatment of employees. The ethical lens provides a framework for employees to interrogate, challenge, and scrutinize business practices to ensure that they promote the common good. However, while ethics defines the character of right action, the law lays out what is legally required. Law without ethics supports workplaces that are inconspicuous, calculated and profit-centered without a concern for the common good. Ethics without the law produces workplaces that are democratic, respectful and inclusive but are unable to meet the bottom-line. Both the law and ethics are required to remind corporations that they have a responsibility not merely to produce economically profitable organizations, but to recreate and reimagine workplaces that are committed to affirming workplace cultural diversity, corporate accountability, and the highest democratic ideals.

## V. CONCLUSION

In this article, we introduce the lens of cultural profiling to reexamine taken-for-granted practices and policies that assess cultural fit in the workplace. The cultural-profiling lens enables us to describe the rationale for assessing fit, the means through which employers evaluate fit, and the consequences of such practices for dominant- and marginalized-group members. By viewing these seemingly neutral policies and practices as a form of workplace profiling, we are able to interrogate the intentions and implications in legal, ethical, and business terms.

We rely heavily on identity performance theory to explicate the dynamic relationship between corporate pressures to ensure conformity and individual aspirations to advance while maintaining their authenticity. Identity-performance theory illuminates the complex ways individuals make an on-going series of choices regarding their appearance, emotional expressions, group affiliations, verbal disclosures, and status claims in order to negotiate their workplace environment and to avoid the scrutiny and chastisement of cultural-profiling practices.

We conclude that cultural profiling remains prevalent for three key reasons: to maintain cohesion, to meet consumer preferences, and to maintain control. Yet, our in-depth analysis of the consequences of cultural profiling suggests that because it constrains identity performance and forces workers to behave inauthentically, cultural profiling causes more harm than benefit. It does succeed in preserving cohesion among the dominant group and in reifying the dominant culture's values and style within the organization. Under this rhetoric of monitoring "professionalism," the dominant culture is elevated as uniform, neutral and immutable, when it actually represents patterns of behavior of past and present organizational and societal leaders. Whiteness and masculinity remain depicted as normative, universal, and invisible, while other social identities are viewed as deviant and unnatural. This universal depiction of "professionalism" places a burden on marginalized groups to prove their ability to fit into the dominant culture, and ultimately serves to reproduce the existing hierarchy.

When one examines the legal rulings on cultural profiling, one might become discouraged regarding the lack of protection for authentic cultural-identity performance in the workplace. These cases, by relying on Title VII, have mostly focused on aesthetic indicators of racial, ethnic, gender, and religious identity. We extend the scope of identity performance to include other “comfort work,” which is less tangible than aesthetic modifications, and therefore even more difficult to protect under the code of Title VII. When historically-disadvantaged groups are pressured to render their selves non-threatening at work, or are punished for exhibiting the same emotions and behaviors that dominant-group members are rewarded for expressing, there is virtually no legal recourse for their psychological and career sacrifices.

To address these issues, courts would need to expand the definition of discrimination and consider the intent and impact of seemingly neutral, legitimate business practices. We do acknowledge that the coercive arm of anti-discrimination law as it now stands may not be the only, or best, means for alleviating the costs of workplace cultural profiling. We also do not expect that the labor market will resolve these issues on its own as the logic of the market often finds that it is in its best interest to maintain discriminatory policies despite evidence to the contrary. Although some theories claim that all employees are free agents who choose to work for organizations that are perfectly suited to their own values and career goals,<sup>148</sup> we offer that many employees have a limited set of choices in the quest for person-organization fit. The variance in organizational cultures is often overstated; norms and expectations for “professionalism” are consistently equated with dominant-group characteristics across industries. Thus, workers whose cultural identities are marginalized in one firm (i.e., an investment bank, law firm, or consulting firm) will very likely face similar marginalization in other firms. The amount of agency that individuals hold in pursuing employment relationships also tends to be overstated; because workers are financially dependent upon jobs, and are only able to hold jobs for which they are qualified, they may be forced to work in organizations that monitor them for deviance and constrain their identity performance for long periods of time.

Corporations must be confronted with empirical data that demonstrates the costs of workplace profiling practices before they will seriously consider expanding the definitions of “professionalism” and fit to be more inclusive of diverse cultural backgrounds. In addition to scholarship, social advocacy may be required to increase freedom of expression. Social movements, such as the Civil Rights Movement, catalyzed the legislative changes that supported the Civil Rights Act and anti-discrimination rulings. Effecting radical change may once again require such individual and collective acts of courage from marginalized workers and those who support them.

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148. Benjamin Schneider, *The People Make the Place*, 40 PERSONNEL PSYCHOL. 437, 440–45 (1987). Schneider’s attraction-selection-attrition (ASA) model proposes that employees make decisions to join or leave an organization based on the extent to which they perceive congruence or fit between their personality, attitudes and values and the organization’s values, goals, structures, processes, and culture. Thus, both employers and employees engage in the fit-assessment process.

Despite the fact that many plaintiffs have lost their identity-performance discrimination suits, we still observe changes in workplace culture. Whereas American Airlines prohibited completely-braided hairstyles, it is now more common to see flight attendants with various body types, hairstyles, and dialects on many airlines. Likewise, it is not uncommon to see highly-successful African-American women with dreadlocks graduate from Ivy League institutions, serve as tenured professors, and pursue successful careers as executives in elite professional-service corporations. We are therefore encouraged by the small acts of courage by those who have fought and continue to fight to create a more inclusive work environment and by firms that realize that cultural diversity in the workplace is valuable in and of itself. Their actions are deconstructing the definitions of "professionalism" by softening hearts and unlocking minds one chamber at a time.

We believe that corporations have an enormous opportunity to shape the environment of the workplace so that it allows organizations to maximize long-term profits and create democratic structures that enable widespread participation in the goods of society. We also believe that corporations will play a critical role in developing approaches to respond to the new forms of discrimination that test the limits of antidiscrimination law. Whatever steps the court takes, we can rest assured that brave individuals will continue to affirm aspects of their identity that are important to who they are in order to demonstrate the varied, multi-layered, and dynamic aspects of cultural identity. We hope that, one day, courts and most corporations will offer more support for authentic identity performance in the workplace.